Office-Supreme Court, U.S.
FILED
MAY 21 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1768

In the Supreme Court of the United States

October Term, 1980

THOMAS LANCI,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

JOHN T. CORRIGAN, *Prosecuting Attorney*
of Cuyahoga County, Ohio
Counsel of Record

ALBIN LIPOLD
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 623-7800
Attorneys for Respondent

JAMES R. WILLIS
Bond Court Building, Suite 1609
1300 East Ninth Street
Cleveland, Ohio 44114
(216) 523-1100
Attorney for Petitioner

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

COUNTER QUESTIONS OF LAW

1. The trial court's dismissal of one count of a multiple count indictment inures to a petitioner's benefit. Where the Court instructs a jury not to consider such a dismissed count, the petitioner is not prejudiced by his failure to request specific instructions in relation thereto.

2. Consistency between the verdicts on the separate counts of an indictment is unnecessary where petitioner is convicted of one count, but acquitted on others.

3. The petitioner's failure to request limiting instructions to the introduction of certain evidence constitutes a waiver of any error in the Court's omission to so instruct.

4. The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and that was not considered or decided by that Court.

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TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed the conviction. The Supreme Court of Ohio sua sponte dismissed the appeal for the reason that no substantial constitutional question existed therein.

The Ohio Courts decided this case in accordance with the statutes of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is, therefore, presented by the petition for certiorari.

STATEMENT OF THE CASE

On March 7, 1978, Thomas Lanci and Kenneth Ciarcia were indicted along with Louis J. Aratari, Renaldo Guiliani, aka Ronald Arthur Guiles and Anthony Liberatore on a three count indictment. The indictment charged all of the defendants with aggravated arson, Ohio Revised Code, Section 2929.02, by substantial risk of physical harm to Daniel J. Greene; aggravated murder, Ohio Revised Code, Section 2903.01, with specifications of the death of Daniel J. Greene; and engaging in organized crime, Ohio Revised Code, Section 2923.04, upon arraignment of the defendants Lanci and Ciarcia entered pleas of not guilty.

A hearing on the State's motion to consolidate the trial of John Calandra, indicted under a separate indictment for the same charges, with the defendants Lanci and Ciarcia, commenced on May 31, 1978. The motion to consolidate was granted. Immediately thereafter, numerous defense motions were heard and decided by the Court prior to jury selection which began on June 14, 1978. At the conclusion of the State's case a motion for judgment of acquittal as to the third count of the indictment was granted as to all three defendants. On August 25, 1978, the jury returned its verdict finding defendants Lanci and Ciarcia guilty of aggravated murder, as charged in the second count of the indictment, and not guilty of aggravated arson as charged in the first count of the indictment. The jury found the defendant John Calandra not

guilty of all counts. The defendants Lanci and Ciarcia were then sentenced as appears on record.

The petitioner Thomas Lanci then appealed to the Court of Appeals for the Eighth Judicial District of Ohio. The Court of Appeals upheld the conviction of Thomas Lanci. Subsequently, the Supreme Court of the State of Ohio dismissed the appeal to that Court for the reason that no substantial constitutional question existed therein.

STATEMENT OF FACTS

The evidence did show that the following persons at one time or another were involved in the conspiracy to kill John Nardi, Danny Greene and his associates: James Fratianno, Raymond Ferritto, Tony Delsanter, James Licavoli, also known as Jack White, Ronald Carabbia, John Calandra, Thomas Lanci, Kenneth Ciarcia, Anthony Liberatore, Alfred Calabrese, Tom Sinito, Angelo Lonardo, Pasquale Cisternino, Louis Aratari, also known as Tony Aratari, or Tony DeMarco, and Ronald Guiles, also known as Renaldo Guiliani.

Raymond Ferritto, who previously pled guilty to the murder of Daniel Greene, and who had turned State's evidence, testified that sometime after the death of John Scalish in May of 1976, he and a longtime friend and associate, James Fratianno, who resided in California, met with each other in Warren, Ohio. Fratianno discussed in detail with Ferritto the problems of the Cleveland family of organized crime, the problems they were having in controlling the town, and the fight that the Cleveland organization, and James Licavoli, also known as Jack White, was having with the John Nardi—Daniel Greene group.

Ferritto met with Delsanter, who said that Nardi and Greene were trying to muscle in on some of the gambling activities and they would have to be killed (R. 1314). About three weeks later, he again met in Warren, Ohio, with Delsanter, Carabbia, Cisternino and Licavoli and again discussed the killing of Nardi and Greene. In the Spring of 1977, Ferritto met with John Calandra, Carabbia, Cisternino, again to discuss the killings.

Ferritto was told he would receive a lump-sum payment, or that he would be taken to Detroit and made a member of the organization called "Our Thing" (R. 1319). Also, if he were made a member of the organization that he would get 25 percent of the proceeds of organized crime in the Youngstown—Warren area (R. 1367).

Ferritto subsequently learned of at least two attempts on Nardi's life by gunfire and one attempt to bomb the car of Nardi and Greene at Hopkins Airport. John Nardi was then killed by a bomb blast on May 17, 1977.

In May of 1977, Cisternino and Calabrese visited Ferritto in Erie, Pennsylvania, when they gave him a 1973 Plymouth automobile, that Ferritto subsequently obtained a Pennsylvania title for, under the fictitious name of Guy Mitchell. This car was later identified as being at the bombing scene of Greene's death.

Louis Aratari and Ronald Guiles, who were also indicted for the murder of Daniel Greene, testified for the prosecution. Both men served time together for crime committed in Ohio. Aratari for armed robbery and Guiles for first degree murder.

The evidence shows that Aratari first met Anthony Liberatore between April and June of 1977 (R. 2062-2063). Also, that he met and knew Lanci prior to August 15th

(R. 2102-2103), and Ciarcia shortly thereafter. Aratari also met Jack White and Calandra in the Murray Hill area.

On August 15, 1977, the Feast of the Assumption was being celebrated upon the "Hill". At the Roman Gardens, Aratari heard considerable conversation about the killing or attempted killing of Danny Greene. Lanci asked Aratari if he could do the job, and Aratari said sure.

Lanci said he would talk to his uncle, Anthony Liberatore, who was at that time the business manager for Local 860 in the Laborers Union, and a member of the Regional Sewer Board.

A couple of days later, Aratari was called at home and told by Lanci that Liberatore wanted to see him. The next morning Aratari went to Liberatore's office, Local 860, on East 40th Street in Cleveland, Ohio, and discussed the possibility of killing Danny Greene.

Aratari told Liberatore he could do the job. Liberatore stated that, "If you can make the hit on Greene, you don't have to worry about money no more".

Lanci and Liberatore told Aratari that Greene was a pretty powerful man in town, and if the Italians wanted to get anything back, particularly gambling, they had to kill Greene (R. 2322-2323).

Ferritto, during the summer of 1977, stayed at three motels: The Holiday Inn, Ramada Inn and Sheraton, all at I-271 and Euclid Avenue. He registered in these motels using his own name and credit card (R. 1333).

In the latter part of August or early September, Ferritto first learned that Liberatore had two men (Aratari and Guiles) working for him and that maybe they could be of some help on the Greene matter (R. 1355). He

met Aratari (R. 1359), and Guiles (R. 1361) at the Ramada where plans were further discussed to kill Danny Greene.

Ronald Guiles testified that he first met Lanci around September 19, 1977 at Lanci's office (R. 2967) and later at the Roman Gardens (R. 2971).

Aratari and Guiles both testified that they attended a wedding reception on September 24, 1977; that Lanci, Ciarcia and Liberatore were there (R. 2982); that they discussed fast cars, guns and had a general conversation about killing Greene (R. 2984). On the same night of the wedding, he and Aratari went to the Arthur Murray Dance Studio and obtained the 30.06 rifle, on arrangements made by Lanci.

Diane Knapik, an employee of the Arthur Murray Dance Studio, testified that she knew Lanci; that on a Saturday night in the Fall of 1977, Lanci *called* her on the phone (R. 4552) and made arrangements for Aratari and Guiles to pick up a package (rifle and ammunition) (R. 4244). She further testified that the two men came in, got the weapon and left. She later identified Aratari and Guiles, by photographs, as those two men.

Guiles and Aratari testified that Ciarcia furnished them with a former police car to be used for the "hit"; that Guiles used the name Carl Noble for temporary plates (R. 2994); that when they picked up the car shortly after the wedding, the power steering went bad and the car had to be towed back to the dealership from Aratari's home (R. 2996); that the car was repaired and picked up within a day (R. 3003), and used by them on the day of the killing. This is corroborated by the tow record and repair order taken from the records of Cross Roads Lincoln Mercury.

Guiles testified that he met Lanci and Liberatore at the Roman Gardens and on two separate occasions met Liberatore at a doughnut shop wherein the conversations all related to the killing of Danny Greene. He testified that Liberatore said, ". . . Mr. White (Licavoli) wants this done (the killing of Greene) right away" (R. 3016); that he met Ferritto and Carabbia at the Ramada Inn on two separate occasions (R. 3022, 3029).

As to the dates on which various meetings or events took place, Guiles stated, "One or two I know are correct, the others are—the dates may not be correct, but the incident is correct" (R. 3089).

Aratari would see Lanci everyday when he was available, if he wasn't on a trip to Florida or somewhere else. He also stated that Lanci played a lot of golf (R. 2454-2455, 2463). As to specific dates, Aratari said on cross-examination, ". . . I keep telling you I don't remember the dates".

Ferrito, Carabbia, Cisternino, Aratari and Guiles, during the summer and early fall of 1977, all tried to track down Greene. Aratari testified that he and Guiles were sent all over town looking for McTaggert, Ritson and then Greene (R. 2105).

Delsanter died on August 2, 1977. At his funeral in Warren, Ohio, and attending the funeral were Licavoli, Cisternino, Carabbia, Calandra, Ferritto and Fratianno. At that time, Ferritto first learned of attempts to tap the telephone of Greene; he also was told by Licavoli, Cisternino, Carabbia and Calandra that they had someone in the FBI who had furnished a list of informants; and that Greene was on that list (R. 1352-1353).

Geraldine Robinowitz, former file clerk for the FBI in Cleveland, Ohio, testified that upon the urging of Ciarcia

and in the Spring of 1977, she first took documents from the FBI (R. 3616); that Ciarcia first asked for information on himself, James Licavoli and Anthony Liberatore (R. 3620); that when she first gave secret information to Ciarcia, Lanci was present (R. 3629 & 3726); that in a list of FBI informants she delivered, Greene's name was on the list (R. 3637); that the list was given to Ciarcia at Cross Roads Lincoln Mercury and that Liberatore was present and gave her $1,000 at the time (R. 3638); that she delivered other documents and information to Ciarcia including reports on Licavoli and another list of informants including about 45-50 names.

In consideration for her efforts, Robinowitz was promised that a civil lawsuit she had pending would be pushed along. Also, she received an interest free cash loan in the amount of $15,000 from Liberatore to be used by her towards the purchase of a new home. At the time this was agreed to, Lanci and Ciarcia were present.

During the first week of October, Ferritto, Carabbia, Cisternino, Licavoli, Lonardo and Calandra met at Mosquito Lake. There Ferritto heard a tape recording of a female making a dental appointment for Danny Greene (R. 1384-1387) on October 6, 1977.

Cathy Grubbs, receptionist for Dr. Rossi, DDS, at Brainard Place, Lyndhurst, Ohio, confirmed the fact that Greene had an appointment on Thursday, October 6, at 2:00 p.m. and that the appointment was made on October 3rd (R. 1117). Denise Schmidt, girl friend of Greene, testified that she made the appointment (R. 1169).

In the morning of October 6, 1977, Ferritto, Carabbia and Cisternino all met at apartment 333, 27400 Chardon Road, Willoughby Hills, Ohio. There they assembled the bomb. Ferritto drove his 1973 Plymouth to Brainard Place,

followed by Carabbia, who drove a 1970 Chevrolet Nova bomb car, also registered to a fictitious person. There they met with Aratari and Guiles. The plan was to either shoot Greene with a scoped rifle or use the bomb package to kill if the opportunity presented itself.

When Greene's car arrived in the parking lot and Aratari and Guiles did not shoot him with the rifle because the Ferritto team could spot the bomb car. Ferritto backed the Nova car next to Greene's and a dynamite charge was placed in a metal container on the passenger side which was adjacent to the driver's side of Greene's car. When Greene left the doctor's office and approached his car, the bomb was remotely detonated by Carabbia and Greene was killed immediately. At the time, Ferritto and Carabbia were in the 1973 Plymouth and driving slowly toward the entrance ramp to I-271.

Lester Adelson, Deputy Coroner and Senior Pathologist, testified that Daniel Greene died as a result of multiple explosive injuries of his trunk and extremeties by bomb blast, with resultant immediate fatal injury (R. 1301).

Deborah L. Spoth testified that on October 6, 1977, she was driving her automobile near Brainard Place; that as she turned the corner to enter I-271, she heard an explosion and stopped her car. She observed a blue Plymouth across from her. She saw the driver, Ferritto, and a man in the back seat, Carabbia (R. 1937). As she proceeded onto the freeway, she again saw the same car. Her husband, who was a passenger, wrote down the Pennsylvania license plate number (R. 1941). She then related to her father, a Berea policeman, all that she witnessed. Within a few days, she identified a photo of Ferritto (R. 1945), and subsequently identified Carabbia (R. 1952).

Shortly after the Greene killing, Aratari received $5,000.00 from Lanci for his work (R. 2265). Aratari gave

$2,000.00 of this amount to Guiles. Aratari also received approximately $2,000.00 in clothes from Lanci who was a Vice-President at Diamond's Clothes (R. 2267, 2611). He also got a job through Liberatore and Lanci working for a union at $300.00 per week (R. 2269).

Henry Lum, owner of Cross Roads Lincoln Mercury, testified that in March of 1978, he found a Fruit Loops cereal box containing numerous FBI documents at his dealership where Ciarcia was a salesman. The contents and the box were turned over to the FBI and subsequently processed for fingerprints (R. 3818). The following latent fingerprints and palmprints were found on the various documents and papers: Lanci, 60 fingerprints and 3 palmprints; Ciarcia, 41 fingerprints and 5 palmprints; Calandra, 1 fingerprint; Liberatore, 1 fingerprint; Orlowe, girl friend of Ciarcia, 3 fingerprints; Geraldine Robinowitz, 1 palmprint; and Henry Lum, 3 fingerprints.

Dennis Sassano, of the Diamond Men's Store in Elyria, Ohio, testified that on October 7th, Lanci and a man named Tony, did come into his store and did remove certain merchandise (R. 4601-4602). Aratari testified that the clothing he received was in part payment for his participation in the Greene killing.

Aratari and a man named Percio, were arrested on February 28, 1978, after his automobile, stolen with stolen plates (R. 2937), was observed in the late evening hours in front of O'Donnell's Islander Bar. Recovered by the police at that time were a .357 Magnum pistol and a sawed-off shotgun Aratari said he received from Lanci for the Greene killing. Also, a shotgun Aratari testified that he received from Ciarcia was recovered. Donald Parker previously testified that he sold the .357 Magnum (State's Exhibit 88) to Lanci in 1974 or 1975. James Turner testified that he purchased the shotgun and left it at Ciarcia's girl friend's home in November, 1977.

DEFENSE EVIDENCE

Defendants Lansi and Ciarcia both testified in their own behalf and offered evidence in support thereof. Both defendants denied involvement in the Greene killing. However, they did make significant admissions.

Lanci testified that he did meet Aratari through Del-Monte, Jr., and met Aratari at Liberatore's office where he claims to have sold the .357 Magnum to Aratari (R. 6520). He admits to being at the wedding where Aratari, Guiles and the Robinowitzes place him. He admits knowing Longaro, owner of the dance studio where Aratari and Guiles picked up the 30.06 rifle. He admitted being at the Flame Restaurant with Greene and Liberatore as previously testified to by Aratari and Peterson, Manager of the Flame (R. 6535). Also, he admitted going to the Diamond Men's Store in Elyria with Aratari on October 7th (R. 6540-6541); to being at Noreen Orlowe's home and to seeing the FBI documents which he claims were given to him when Ciarcia was going to have heart surgery in November or December, 1977 (R. 6547).

Ciarcia testified that he knew Liberatore since 1958. Also, that he knew Lanci and Geraldine and Jeff Robinowitz. He testified that he was present when Liberatore gave Geraldine Robinowitz $1,000.00 and she gave him a list of FBI informants (R. 6284). He admitted receiving various documents from Robinowitz (R. 6286) and also being present when the $15,000.00 was passed from Liberatore to Robinowitz (R. 6285-6286). Ciarcia admitted knowing Aratari and stated he sold the '74 used police car to Carl Noble (Aratari) rather than to have permitted him to use it for the Greene killing (R. 6302).

REASONS FOR DENYING THE WRIT

1. The trial court's dismissal of one count of a multiple count indictment inures to a petitioner's benefit. Where the Court instructs a jury not to consider such a dismissed count, the petitioner is not prejudiced by his failure to request specific instructions in relation thereto.

See, *State v. Rogers,* 64 Ohio App. 39; *State v. Carver,* 30 Ohio App. 2d 115; *U. S. v. Smith,* 343 F.2d 847; *U. S. v. Santos,* 385 F.2d 43; *State v. Lane* (1976), 49 Ohio St. 2d 77; 10 O. JUR. 2d, *Constitutional Law,* Sec. 158.

Some of the evidence offered as to the count charging organized crime was offered primarily to prove the existence of a conspiracy to kill Danny Greene as it related to the other counts of the indictment. Raymond Ferritto testified that in a conversation with Tony Delsanter, ". . . he asked me if Jimmy Fratianno talked to me . . . about problems in Cleveland . . . with Nardi and Greene . . . that they were trying to muscle in on some of the gambling activities and they wanted . . . them killed" (R. 1314); in conversations with Jack White (Licavoli), ". . . he told me . . . he was going to give me 25 per cent of all the gambling and things that were going on in Warren - Youngstown area . . ." for killing Greene. As to the documents taken from the FBI files, Ferritto testified that he was told by Jack White, Cisternino and Calandra ". . . that they were going to receive some information directly from the FBI office by someone who was working there and . . . this information would pertain to informants". He also testified that they received the list and Greene's name was on it (R. 1351-1352). Sixty of Lanci's fingerprints were on those stolen documents, and three of Lanci's palmprints.

It is obvious that the conversation as testified to by Ferritto were admissible against the co-conspirators on the murder count and also the count charging organized crime. In conspiracy trials, each party to a conspiracy is criminally responsible for all acts done in furtherance of the conspirational design and they become ad hoc agents for one another, and what one does pursuant to their common purpose, all do, and as declarations may be such acts, they are competent against all. *State v. Rogers,* 64 Ohio App. 39; *State v. Carver,* 30 Ohio App. 2d 115; *U. S. v. Smith,* 343 F.2d 847; and *U. S. v. Santos,* 385 F.2d 43.

The crime as outlined in Ohio Revised Code, Section 2923.04, *Engaging in Organized Crime,* a substantive conspiracy crime, was adopted by the Ohio Legislature and made effective January 1, 1974. The legislature enacted this section based largely on the same crime as found in the Proposed Federal Criminal Code. No prior law existed in this State governing these matters. Appellant alleges that the engaging in organized crime statute is unconstitutional. However, for trial purposes, the presumption of constitutionality should exist.

In 10 O. JUR. 2d, *Constitutional Law,* Section 158, it is held:

> "It is firmly established that the courts must always indulge a strong presumption in favor of the constitutionality of legislation. This principle has been variously expressed, and is closely connected with the rule that the courts will construe legislation so as to uphold its constitutionality if possible, and will resolve all doubts in favor of constitutionality."

At Section 162 it is held:

> ". . . It is the duty of the court where constitutional questions are raised to liberally construe a statute . . . to save it from constitutional infirmities. . ."

That the Court entered judgment for defendants on the organized crime statute, at the conclusion of all of the evidence, inures to the benefit of them. There has been no showing of an inadmissible spill-over effect that would be prejudicial to appellants. It is interesting to note, that the Court conceded there was sufficient evidence of the crime, but just an insufficient number of chargeable people to satisfy the statute.

The petitioner's suggestion that his request to limit the scope of the prosecution's final argument is akin to a request for instruction is, of course, unwarranted. A petitioner may not assign as error his failure to request specific instructions. *State v. Lane* (1976), 49 Ohio St. 2d 77. It must be noted, in the case before us, that the Court did instruct the jury not to consider the dismissed organized crime count (R. 7224).

2. Consistency between the verdicts on the separate counts of an indictment is unnecessary where petitioner is convicted of one count, but acquitted on others.

See, *State v. Adams* (1978), 53 Ohio St. 2d 223; *State v. McNicol* (1944), 143 Ohio St. 39; *Browning v. State* (1929), 120 Ohio St. 62; *Griffin v. State* (1868), 18 Ohio St. 438; *State v. Perryman* (1976), 49 Ohio St. 2d 14; *Ledbetter v. State* (1961), 224 Md. 271, 167 A.2d 596; *People v. Steinbridge* (1950), 99 Cal. App. 2d 15, 221 P.2d 212; and Ohio Revised Code, Section 2929.03(A).

As stated by the Court of Appeals in this case, "It has long been the law within this State that there need not be consistency between verdicts on separate counts of a criminal indictment . . . *State v. Adams* (1978), 53 Ohio St. 2d 223; *State v. McNicol* (1944) 143 Ohio St. 39; *Browning v. State* (1929), 120 Ohio St. 62; and *Griffin v. State* (1868), 18 Ohio St. 438. . ."

In *State v. Perryman* (1976), 49 Ohio St. 2d 14, the Court held:

> "3. Where a jury convicts a defendant of an aggravated murder committed in the course of an aggravated robbery, and where that defendant is concurrently acquitted of a specification indicting him for identical behavior, the general verdict is not invalid."

The Court at page 26 said, ". . . Furthermore, as indicated in R.C. 2929.03(A), one may be convicted of aggravated murder, the principal charge, without a specification. Thus, the conviction of aggravated murder is not dependent for the finding of the specifications thereto. . ."

In the case of *Ledbetter v. State, supra,* a verdict of guilty of murder was held not inconsistent with an acquittal of robbery during which the murder was alleged to have been committed. The Court pointed out that the jury could have concluded without being completely illogical that defendant had attempted to rob the victim, but had not personally succeeded, and thus acquitted him of robbery while finding him guilty of murder because he was acting in a common design with his three companions who had robbed and murdered the victim. The Court further cited authority that a conviction on one count may stand even in the face of an inconsistent acquittal on another count.

It was held in *People v. Steinbridge, supra,* that burglary and murder are two separate and distinct offenses and it is not a reversible inconsistency that the jury acquits on a count charging burglary but convicts on another count charging murder.

The jury finding of guilty of aggravated murder against petitioner, and not guilty of the specification and not guilty

of aggravated arson, does not call for reversal because of inconsistency.

3. The petitioner's failure to request limiting instructions to the introduction of certain evidence constitutes a waiver of any error in the Court's omission to so instruct.

See, *State v. Lane* (1976), 49 Ohio St. 2d 77; *State v. Tudor,* 154 Ohio St. 249; *State v. Scott,* 107 Ohio St. 475; and *Knotts v. Valocchi,* 2 Ohio App. 2d 188.

The Court allowed into evidence acts relevant to show the conspiracy to kill not only Danny Greene, but also his associates. Particularly and as it relates to Lanci and Ciarcia, their participation in the entire conspiracy, reveals why Greene was killed.

In relation to the theft of government documents, the evidence reveals that an informer's list was obtained from the FBI files, and was in the hands of the conspirators, more than a month prior to the killing of Danny Greene. Danny Greene's name was on that list (R. 1352). That in fact Greene was an informer was later verified by Ferritto as he listened to tapes, taken from the Greene telephone tap, as he overheard Greene talk to members of the FBI (R. 1348).

Aratari testified particularly to the continuing involvement in the conspiracy by Lanci, Ciarcia and Liberatore. He stated that at first he was put on Kevin (McTaggert) and Keith (Ritson) and then on Greene (R. 2105). He further testified that Lanci told him, "My uncle (Liberatore) and I have decided that we got to pull you off Keith and Kevin, because Ray Ferritto and Ron Carabbia cannot handle Danny Greene alone" (R. 2136).

After Greene was killed, Aratari testified that he kept in close contact with Lanci, Ciarcia and Liberatore. "My work was not finished . . . I had to work on about four other contracts. . . The main concern was the Irish crew . . . They told me to get the Irish kids out of the way" (R. 2262).

It is interesting to note that appellant complains bitterly about the Court's failure to charge the jury on the limited use of such testimony.

The Court and all counsel, including the very able, experienced and competent trial attorneys for appellant, discussed the Court charge on many occasions during the trial. The Court specifically requested of counsel to furnish suggested charges and to assist in the preparation of the charge (R. 3801, 6256, 6266, 7044, 7119, 7250).

Counsel for Lanci and Ciarcia, rather than to request a charge on other act testimony, specifically requested of the Court not to charge the jury on aiding, abetting and conspiracy (R. 7209, 7363). When the charge was read to the jury, again, counsel were given the opportunity to discuss omissions additions to the charge, etc. They made no request for the limiting instructions of which they now complain (R. 7666-7676).

In *State v. Lane* (1976), 49 Ohio St. 2d 77, the Court held:

> "A party may not assign as error the trial court's giving or failure to give any instructions unless that party objects thereto, before the jury retires to consider its verdict, and states specifically the matter to which he objects and the grounds for his objection (Crim. Rule 30). The Court at Page 84 further stated that by his failure to comply with the directives of Crim. Rule 30, the appellant has waived any possible error."

In *State v. Tudor,* 154 Ohio St. 249, that Court held:

> "1. Where a trial court gives an instruction in answer to an inquiry of the jury which instruction is incomplete but correct as far as it goes, counsel has the duty to request the trial court to charge further so as to eliminate any possible confusion of the jury which may result from the incompleteness of such instruction. Any failure to charge further, if it is error, is an error of omission and not of commission. Unless counsel has requested the court to supply the omission, such error will not ordinarily justify reversal even in a criminal case."

The Court in *State v. Scott, supra;* and *Knotts v. Valocchi, supra* held as in *State v. Tudor, supra.*

4. The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and that was not considered or decided by that Court.

The petitioner did not raise the issue of ineffective assistance of counsel in the Court of Appeals. As stated by the Supreme Court of Ohio in *Toledo v. Reasonover* (1965), 5 Ohio St. 2d 22, the ". . . Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that Court. . ." To do so, ". . . we would be permitting the defendant to bypass the Court of Appeals." *State v. Jones* (1965), 5 Ohio St. 2d 13.

In any event, counsel at the trial level were very experienced and able trial counsel. They were counsel of petitioner's choice. The record reflects, because of the nature and extent of the defense presented, the attorneys

had more than adequate time for trial preparation. Petitioner should not now be heard to complain that because of trial tactics, prior design, ploy, strategy or purpose, his defense did not materialize as intended.

CONCLUSION

In conclusion, the respondent submits that the petition herein fails to present any question of constitutional dimension justifying review by the Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN T. CORRIGAN, *Prosecuting Attorney of Cuyahoga County, Ohio*
Counsel of Record

ALBIN LIPOLD
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 623-7800
Attorneys for Respondent